SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

No. 74-1065

THE PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

LARRY GRAYSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Respondent.

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OPINION BELOW

The opinion of the Supreme Court of Illinois in this case is reported at 58 Ill. 2d 260, 319 N.E. 2d 43 (1974) and is attached hereto as Petitioner's Appendix A. The opinion of the Appellate Court of Illinois, First District, First Division in this case is reported at 13 Ill. App. 3d 1049, 301 N.E. 2d 33 (1973) and is attached hereto as Petitioner's Appendix B.

JURISDICTION

This Petition for Writ of Certiorari is filed pursuant to Title 28 U.S.C. § 1257(3) and seeks review of the judgment of the Supreme Court of Illinois entered on September 17, 1974. A Petition for Rehearing was filed with that Court on October 8, 1974 and denied on November 26, 1974.

QUESTION PRESENTED FOR REVIEW

Whether the Fifth Amendment doctrine of collateral estoppel bars a proceeding to revoke probation premised upon the same evidence presented at an earlier criminal trial of the probationer which resulted in an acquittal?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On February 21, 1969, Larry Grayson, the respondent herein and Donald Hall, entered pleas of guilty to a Cook County indictment charging them with armed robbery and both were sentenced to five years probation. Both men were thereafter indicted for the armed robbery of Thaddeus Lukas on April 9, 1970. Prior to trial, defense counsel filed a motion to suppress the identification of the two defendants, which motion proceeded to a hearing on July 20, 1970 before Judge Garippo. At that hearing the complaining witness and his brother testified. At the conclusion of the evidence, the Court stated:

> The Court: Gentlemen, I feel that the line-ups were satisfactorily conducted. However, I feel that in view of the circumstances surrounding the identification, I feel that the identification would not convince me beyond a reasonable doubt that these defendants are guilty of this offense. (A. 37)*

The Court then denied the motion to suppress. The defendants at that time waived a trial by jury and both sides stipulated that the evidence heard on the motion to suppress would be the same at trial. The court then entered a finding of not guilty as to both defendants.

On October 28, 1970, a hearing was conducted before Judge Collins on a rule to show cause why both defendants' probation should not be revoked. In support of revocation, the People presented the testimony of Thaddeus

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*"A." refers to the Abstract of Record filed in the Supreme Court of Illinois in *People* v. *Grayson*, No. 46155.

Lukas and his brother, the witnesses who had previously testified in the armed robbery case before Judge Garippo. The defendants presented no evidence other than a partial transcript of the proceedings before Judge Garippo containing the Court's conclusion (previously quoted above) that the identification testimony would not convince him beyond a reasonable doubt of the defendants' guilt. At the close of the evidence on probation revocation, Judge Collins revoked probation and sentenced each defendant to three (3) to eight (8) years in the Illinois State Penitentiary.

Both defendants appealed the probation revocation to the Appellate Court of Illinois, First District, First Division on the ground that the doctrine of collateral estoppel precluded the State from presenting evidence of the Lukas armed robbery in the probation revocation hearing following the not guilty verdict entered by Judge Garippo in the armed robbery prosecution. Rejecting this argument, the Appellate Court affirmed. *People* v. *Grayson and Hall,* 13 Ill. App. 3d 1049, 301 N.E. 2d 33 (1973).

Respondent then filed a Petition for Leave to Appeal to the Supreme Court of Illinois which was allowed. That court, considering the issue of "whether acquittal at a criminal trial precludes a subsequent revocation of probation predicated upon the same evidence which resulted in the earlier acquittal," stated:

> . . . We accordingly hold the principle of collateral estoppel applies in the circumstances present here. The acquittal of defendant on the charge of armed robbery was, under the evidence in this case, a determination that he was not one of the robbers. Once the ultimate and only disputed fact of identity had been determined by a final and valid judgment, the State could not constitutionally hale defendant before a new court in a criminal proceeding or a probation

> revocation proceeding and litigate that issue again. *Ashe* v. *Swenson*, 397 U.S. 436, 25 L. Ed. 2d 469, 477, 90 S. Ct. 1189, 1195; *People* v. *Joyner*, 50 Ill. 2d 302, 308. (58 Ill. 2d at 265)

The Supreme Court reversed the judgment of the Appellate Court and remanded the case for such further proceedings as would be consistent with the court's opinion. The People's Petition for Rehearing was denied by the Supreme Court of Illinois on November 26, 1974.

The People of the State of Illinois present this Petition for Writ of Certiorari to review the judgment of the Supreme Court of Illinois in this case.

REASONS FOR GRANTING THE WRIT

THE DOCTRINE OF COLLATERAL ESTOPPEL EMBODIED IN THE FIFTH AMENDMENT DOUBLE JEOPARDY PROSCRIPTION DOES NOT BAR A CIVIL PROCEEDING TO REVOKE PROBATION GROUNDED UPON EVIDENCE OF A CRIMINAL OFFENSE OF WHICH THE PROBATIONER HAS BEEN ACQUITTED IN A CRIMINAL TRIAL.

In holding that the petitioner under the facts of this case was foreclosed from revoking respondent's probation on the basis of the same evidence presented at an earlier criminal trial which had resulted in a verdict of acquittal, the Court below has misconstrued this Court's opinion in *Ashe* v. *Swenson*, 397 U.S. 436 (1970) and has ignored the clearly defined scope of the Fifth Amendment double jeopardy proscription of which the doctrine of collateral estoppel is an ingredient.

Here the respondent was convicted of the offense of armed robbery and placed on five years probation. During that probationary period, respondent was charged with committing another armed robbery while on probation. At a pretrial hearing on respondent's motion to suppress the lineup identification made by the victim, Thaddeas Lukas, and Lukas' brother (an eyewitness to a portion of the crime), both witnesses testified concerning the circumstances of the crime and their subsequent identification of respondent as one of the robbers. At the close of the evidence, the trial judge overruled the motion to suppress, finding the identification procedures proper, but stated that on the identification testimony presented

he could not determine beyond a reasonable doubt that respondent and his co-defendant were guilty of the offense charged. Both defendants then waived a jury trial and a stipulation was entered that the evidence heard on the motion to suppress would be the same at trial, and the judge entered a verdict of not guilty.

Thereafter, the State proceeded with a hearing to revoke respondent's probation. The evidence presented in support of revocation was the same as that adduced at the trial for the Lukas armed robbery. Respondent offered no evidence other than a partial transcript of the proceedings from the Lukas case containing the trial judge's statement concerning the sufficiency of the identification testimony in sustaining a verdict of guilty beyond a reasonable doubt. At the close of evidence, the court found by a preponderance of the evidence that respondent had violated his probation, revoked probation and sentenced respondent to three to eight years in the Illinois State Penitentiary for the original armed robbery of which he had been convicted.

In reversing the order of revocation, the Supreme Court of Illinois found that the only issue in dispute at the trial of the Lukas armed robbery and the hearing to revoke probation was the identity of the robbers. Relying on *Ashe* v. *Swenson*, *supra*, the court held that the acquittal of respondent on the armed robbery charge constituted a finding that he was not one of the robbers and under the *Ashe* rule, barred the subsequent revocation proceeding premised upon the Lukas robbery.

In *Ashe*, this Court held that the doctrine of collateral estoppel previously applicable to federal criminal cases is embodied in the Fifth Amendment guarantee that no

person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The double jeopardy clause, by its very terms and as it has been consistently interpreted by this Court, protects the individual from repeated efforts by the government to convict him of a criminal offense. *Benton* v. *Maryland,* 395 U.S. 784 (1969); *Price* v. *Georgia,* 398 U.S. 323 (1970). And see *United States* v. *Jorn,* 400 U.S. 470 (1971). The collateral estoppel ingredient of this provision goes to one particular aspect of double jeopardy, i.e., preventing the relitigation in a criminal proceeding of issues of ultimate fact which have been adjudicated in the defendant's favor in some earlier criminal prosecution between the same parties. See, *Ashe* v. *Swenson, supra* at 443; *Turner* v. *Arkansas,* 407 U.S. 366 (1972); *Harris* v. *Washington,* 404 U.S. 55 (1971); *Simpson* v. *Florida,* 403 U.S. 384 (1971). And see *One Lot Emerald Cut Stone and One Ring* v. *United States,* 409 U.S. 232 (1972).

As an ingredient or right embodied within the double jeopardy clause, rather than a separate and distinct constitutional right, the doctrine of collateral estoppel cannot be extended beyond the scope of the Fifth Amendment guarantee in the manner adopted by the Supreme Court of Illinois in this case.

Proceedings to revoke probation are not criminal prosecutions under any rational analysis of the double jeopardy clause. Indeed, the essence of the revocation procedure is to determine the propriety of altering a sentence previously imposed after a valid and final judgment of conviction of a criminal offense, and does not involve the determination of guilt or innocence made in a criminal prosecution. See, *Berman* v. *United States,* 302 U.S. 211

(1937). The proceeding itself is substantially different than a criminal trial, *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), and does not require either proof beyond a reasonable doubt of the violation alleged or proof of conviction of another criminal offense as a prerequisite to revocation. *Burns* v. *United States*, 287 U.S. 216 (1932). And see, 18 U.S.C. § 3653. Under Illinois law, probation revocation proceedings are classified as civil in nature with a violation required to be proven by a preponderance of the evidence. *People* v. *Crowell*, 53 Ill. 2d 447. By its very nature then, probation revocation is not a criminal prosecution and need not be based upon evidence sufficient to convict. See e.g., *Burns* v. *United States, supra.*

These substantial distinctions, and in particular, the difference in the burden of proof between criminal prosecutions and probation revocation proceedings render the fifth amendment doctrine of collateral estoppel inapplicable to probation revocation hearings. As this Court noted in rejecting the application of the collateral estoppel doctrine to a civil proceeding to forfeit goods smuggled into the United States without compliance with required customs procedures following an acquittal of the criminal charge,

> "Moreover, the difference in the burden of proof in criminal and civil cases precludes application of the doctrine of collateral estoppel. The acquittal of the criminal charges may have only represented 'an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.' *Helvering* v. *Mitchell*, 303 U.S. 391, 397, 58 S. Ct. 630, 632, 82 L. Ed. 917 (1938). As to the issues raised, it does not constitute an adjudication on the preponderance-of-the-evidence burden applicable in civil pro-

> ceedings." *One Lot Emerald Cut Stones and One Ring* v. *United States*, 409 U.S. 232, 235 (1972) (citations omitted)

Compare *Coffey* v. *United States*, 116 U.S. 436 (1886) (collateral estoppel bars civil forfeiture action following acquittal in criminal trial where statute defining the offense makes the forfeiture action a penalty upon conviction of the offense).

The validity of this distinction is quite apparent in this case. Here, the trial judge did not find that respondent was not one of the men who robbed Thaddeas Lukas. Indeed, he could not, since there is substantial testimony by the victim and his brother as to the identity of the robbers, although the victim's testimony at times is muddled, apparently due to memory lapses resulting from the beating he suffered at the time of the robbery. Rather, the court found that in his view, the testimony was not sufficient to establish *beyond a reasonable doubt* respondent's guilt. The court hearing the same evidence in the subsequent civil proceeding to revoke probation, however, had no difficulty in determining by a preponderance of the evidence, respondent's participation in violation of his probation. The subsequent revocation is not a finding of respondent's guilt of a criminal offense, but instead, is a finding that he is not a proper candidate for continuation on probation. The sentence of imprisonment imposed thereon has nothing to do with the Lukas robbery, but may only properly be determined by the nature and circumstances of the original offense of which respondent was convicted and for which he was initially placed on probation.

To equate this proceeding with the repetitious criminal prosecution barred by the double jeopardy clause as the Supreme Court of Illinois did here ignores the clear distinctions between a criminal prosecution and a proceeding to revoke probation and expands the concept of collateral estoppel substantially beyond the limits of the constitutional provision from which it is derived.

CONCLUSION

For the aforementioned reasons, the People of the State of Illinois respectfully request this Court to grant the instant Petition for a Writ of Certiorari to the Supreme Court of Illinois in this case.

Respectfully submitted,

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APPENDIX A

No. 46155

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellee,

v.

LARRY GRAYSON,

Appellant.

MR. CHIEF JUSTICE UNDERWOOD delivered the opinion of the court:

Larry Grayson, the appellant here, and Donald Hall pleaded guilty on February 21, 1969, to armed robbery and were sentenced to 5 years' probation. Subsequently both were indicted for the April 9, 1970, armed robbery of Thaddeus Lukas. On July 20, the defendants were acquitted on that armed robbery charge in a bench trial. The evidence against them at that trial consisted of the testimony of the victim and the victim's brother, which the trial judge expressly found insufficient to support a finding of guilt beyond a reasonable doubt. On July 28 a petition to revoke defendants' probation was filed alleging as the only grounds therefor the commission of the Lukas robbery. The same witnesses who had testified at the earlier trial testified at the revocation hearing. A different trial judge found this evidence sufficient to hold defendants had violated their probation, their probation was revoked, and defendants were sentenced to terms of 3 to 8 years on the original armed robbery conviction. The First District Appellate Court affirmed (13 Ill. App. 3d 1049), and we granted defendant Grayson leave to appeal.

While we do not have before us the transcript of the testimony at the bench trial which resulted in the acquittal of defendants, it is not suggested that the evidence heard at the probation revocation hearing was any different from that heard at trial. We shall therefore, as did the appellate court, assume the evidence was substantially the same. The only issue apparently in dispute in both the armed robbery trial and the revocation hearing was the identity of the robbers.

We have not heretofore considered whether acquittal at a criminal trial precludes a subsequent revocation of probation predicated upon the same evidence which resulted in the earlier acquittal. Defendant urges that the judgment of acquittal in the armed robbery trial precluded the State, under the doctrines of collateral estoppel and double jeopardy, from relitigating the controlling facts of the identity of the robbers in a probation revocation hearing, while the State contends the lesser degree of proof (a preponderance of the evidence) required in the revocation hearing permits a different result.

Defendant relies on *Ashe* v. *Swenson,* 397 U.S. 436, 25 L. Ed. 2d 469, 90 S. Ct. 1189. In *Ashe,* the defendant was charged with the separate armed robberies of six participants in a poker game. Defendant went to trial before a jury on the charge of robbing one of the participants and was found not guilty. There was no question that an armed robbery had occurred and that personal property had been taken from each of the participants. The State's evidence that defendant had been one of the armed robbers, however, was weak, and the jury verdict amounted to a finding that defendant was not one of the robbers. Subsequently defendant was tried for the robbery of another participant in the poker game

and was convicted. The same witnesses who had testified at the first trial again testified but gave substantially stronger testimony on the issue of defendant's identity. The Supreme Court stated, "The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict [in the first trial] found that he had not. The federal rule of law, therefore, would make a second prosecution *** wholly impermissible." 397 U.S. 436, 445, 25 L. Ed. 2d 469, 476, 90 S. Ct. 1189, 1195. The Supreme Court reversed defendant's conviction and went on to hold that the principle of collateral estoppel was embodied in the Fifth Amendment guarantee against double jeopardy, and was thus applicable to the States under *Benton* v. *Maryland,* 395 U.S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056.

Collateral estoppel "*** stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." (*Ashe* v. *Swenson,* 397 U.S. 436, 443, 25 L. Ed. 2d 469, 475, 90 S Ct. 1189, 1194; *People* v. *Haran,* 27 Ill. 2d 229.) Defendant contends this principle was offended when he was forced to "run the gauntlet" (*Green* v. *United States,* 355 U.S. 184, 190, 2 L. Ed. 2d 199, 206, 78 S. Ct. 221) twice on the same charge, and the same issue of ultimate fact was relitigated. Defendant contends the acquittal on the charge of armed robbery amounted to a determination that he was not one of the robbers, but that the identity issue was relitigated and the same evidence used to revoke his probation.

The appellate court relied on four earlier appellate decisions that had distinguished probation revocation hearings from criminal trials on the basis of the difference in the burden of proof in each. (See *People* v. *Kuduk,* 320 Ill. App. 610; *People* v. *White,* 98 Ill. App. 2d 1; *People* v. *Whittaker,* 101 Ill App 2d 432; *People* v. *Sluder,* 107 Ill. App. 2d 177.) In a criminal trial, the State must prove the defendant guilty beyond a reasonable doubt, while in a probation revocation hearing, the probation violation need be proved only by a preponderance of the evidence. (*People* v. *Crowell,* 53 Ill. 2d 447.) The reasoning of the appellate court was that while the identification testimony may not have been sufficient to convict of armed robbery, it was sufficient to prove a probation violation by the preponderance of the evidence. The State, in its brief, distinguishes *Ashe* v. *Swenson* from this case on the basis that in *Ashe* the defendant was placed in jeopardy in two separate criminal trials for the same armed robbery, while here defendant was placed in jeopardy only once for the robbery of April 9, 1970, and then was subject to a civil proceeding where his probation was revoked. Defendant was then ordered imprisoned not for the Lukas robbery but for the offense for which he was originally granted probation. Therefore, according to the State, defendant was not twice placed in jeopardy for the same offense, nor did the doctrine of collateral estoppel apply to preclude the court at the probation revocation hearing from considering evidence of the Lukas robbery in determining whether probation should be revoked.

We note, however, that the appellate court decisions predated *Ashe* and *Benton,* and we are not persuaded that the difference in the burden of proof between a criminal trial and a probation revocation proceeding should dictate

the result in this case. While the differences between a criminal trial and a probation revocation hearing are substantial, and we see no reason to modify our determination in *People* v. *Crowell,* 53 Ill. 2d 447, that violations of conditions of probation need be proved by only a preponderance of the evidence, we believe those differences cannot fairly serve to permit relitigation of the identical issue upon the same evidence. (*People* v. *Armstrong,* 56 Ill. 2d 159.) Although proceedings may be civil in form, they may be criminal in nature (*United States* v. *United States Coin and Currency,* 401 U.S. 715, 28 L. Ed. 2d 434, 91 S. Ct. 1041), and the individual facing probation revocation may lose his liberty just as swiftly and surely as a defendant in a criminal case. We accordingly hold the principle of collateral estoppel applies in the circumstances present here. The acquittal of defendant on the charge of armed robbery was, under the evidence in this case, a determination that he was not one of the robbers. Once the ultimate and only disputed fact of identity had been determined by a final and valid judgment, the State could not constitutionally hale defendant before a new court in a criminal proceeding or a probation revocation proceeding and litigate that issue again. *Ashe* v. *Swenson,* 397 U.S. 436, 446, 25 L. Ed. 2d 469, 477, 90 S. Ct. 1189. 1195; *People* v *Joyner,* 50 Ill. 2d 302, 308.

Accordingly, the judgments of the appellate and circuit courts are reversed, and the cause is remanded to the circuit court for such further proceedings as may be consistent with this opinion.

Reversed and Remanded.

APPENDIX B

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee.

v.

LARRY GRAYSON and DONALD HALL,

Defendants-Appellants.

No. 55748

EGAN, Justice.

On February 21, 1969, both defendants pleaded guilty to armed robbery before Judge Robert J. Collins and were placed on probation for five years. In June, 1970, both were indicted for the armed robbery of Thaddeus Lukas, which took place on April 9, 1970, and were found not guilty in a bench trial before Judge Louis B. Garippo. On a hearing before Judge Collins to revoke their probation, the court heard the same identifying witnesses that had testified before Judge Garippo, revoked their probation and sentenced each to a term of three to eight years in the penitentiary. It is the position of the defendants that the finding by Judge Garippo precluded the State from relitigating the question of the robbery of Thaddeus Lukas under the doctrine of collateral estoppel.

At the revocation hearing Thaddeus Lukas testified that he was in his law office at 8801 South Commercial Avenue on April 9, 1970, when two men, he identified as the defendants, came into his office at 2:30 p.m. and robbed him. Both men struck him with their fists, and Hall with a revolver. The following day he identified Hall in a line-up, and two days later he identified Grayson in a line-up.

His brother, Edward Lukas, testified that he heard his brother screaming; and when he ran into his brother's office, he saw two men, he also identified as the defendants, beating his brother. He testified, contrary to his brother's testimony, that he saw Grayson the next day and Hall two days later.

The defendants did not testify but submitted a partial report of the proceedings before Judge Garippo, which contained no testimony but only the colloquy between the judge and lawyers and the judge's ruling. That record reflects that Judge Garippo, who had before him a motion to suppress identification, stated that the identification would not convince him beyond a reasonable doubt but that, since the line-up was satisfactorily conducted, he would deny the motion. A jury was then waived, it was stipulated that the evidence heard on the motion to suppress would be the same at the trial, and the judge found both defendants not guilty. Although we cannot tell from the report of proceedings what evidence Judge Garippo heard, since both sides have proceeded in this court on the assumption that he heard the same evidence that Judge Collins did, we shall also proceed on that assumption.

Collateral estoppel, or estoppel by verdict, was defined in Hoffman v. Hoffman, 330 Ill. 413, 417, 161 N.E. 723, 725, as follows:

> Where some controlling fact or question material to the determination of both causes has been adjudicated in the former suit by a court of competent jurisdiction and the same fact or question is again at issue between the same parties, its adjudication in the first cause will, if properly presented, be conclusive of the same question in the later suit, irrespective of the question whether the cause of action is the same in both suits or not.

It has been described as a branch of the doctrine of *res judicata.* (ILP Estoppel, § 3, page 66.) In the annotation at 9 A.L.R. 3d, page 203, the terms "res judicata" and "collateral estoppel" are used as though synonymous.

The identical question before us has been presented in a number of cases. In People v. Kuduk, 320 Ill. App. 610, 51 N.E. 2d 997, one of the grounds assigned to revoke probation was driving while intoxicated. The probationer had been found not guilty of that offense. The court, in affirming the revocation of probation, relied primarily on the differences between the burden of proof in a criminal trial and a revocation hearing and rejected the argument that the acquittal at the trial was *res judicata* at the revocation hearing. Reviewing courts have consistently followed the *Kuduk* case. In People v. White, 98 Ill. App. 2d 1, 4, 239 N.E. 2d 854, 855, the court said:

> [E]vidence is admissible on the issue of a revocation of probation for the very simple reason that proof of facts justifying revocation of probation may be established only by the greater weight of the evidence whereas evidence sufficient to convict must be proved beyond a reasonable doubt. The insufficiency of the evidence to prove the latter does not establish the insufficiency of the evidence to prove the former. * * * Evidence insufficient to warrant his conviction beyond a reasonable doubt of a violation of the criminal law may very well be evidence sufficient to establish that he had in fact violated the criminal law and to undermine, if not entirely explode, the thought that a continuation on probation will affect rehabilitation outside the penitentiary rather than in it.

The *Kuduk* case was cited in People v. Whittaker, 101 Ill. App. 2d 432, 438, 243 N.E. 2d 467, and the court rejected the same argument that is advanced here. Simi-

larly, in People v. Sluder, 107 Ill. App. 2d 177, 180, 246 N.E. 2d 35, this court held, citing *Kuduk*, "[t]hat a probation proceeding and a criminal proceeding are independent of one another and, accordingly, the result of one has no bearing on the other * * *."

All of the cases cited by the defendants are inapposite since each involves two separate criminal trials.

The judgment of the circuit court is affirmed.

Judgment affirmed.

BURKE, P. J., and GOLDBERG, J., concur.

SUPPLEMENTAL OPINION ON PETITION FOR REHEARING

EGAN, Justice.

In the Petition for Rehearing, the defendants contend that we "failed to appreciate that what was done below is prohibited by the Double Jeopardy Clause of the Fifth Amendment." We refer to the case cited by the defendants in their original brief and in the Petition for Rehearing, Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469. That case held, as the defendants originally argued, that collateral estoppel is embodied in the Fifth Amendment guarantee against Double Jeopardy. (See also People v. Joyner, 50 Ill. 2d 302, 278 N.E. 2d 756.) We wish to make it clear that, when we held that the State was not collaterally estopped, we were also holding that, therefore, there had been no violation of the defendants' rights under the Fifth Amendment.

[2, 3] The defendants also contend, for the first time, that due process requires proof beyond a reasonable doubt at a revocation hearing and that, since the prosecution

seldom proceeds with revocation after an acquittal, the defendants have been discriminately prosecuted and, therefore, denied equal protection of the laws. Since these arguments were not advanced in the original hearing, they are deemed waived. Supreme Court Rule 341 (e)(7); Ill. Rev. Stat. 1971, ch. 110A, § 341 (e)(7); Sobina v. Busby, 62 Ill. App. 2d 1, 210 N.E. 2d 769.

Moreover, in People v. Crowell, 53 Ill 2d 447, 450-451, 292 N.E. 2d 721, the Supreme Court held that a violation of the conditions of probation need be proved only by a preponderance of the evidence. We further find no merit in the defendants' contention that they were denied equal protection of the laws.

We adhere to our original opinion, and the defendants' Petition for Rehearing is denied.

BURKE, P. J., and GOLDBERG, J., concur.

SUPREME COURT, U.S.

FILED

OCT 5

MICHAEL RODAK, JR.

In The

Supreme Court of the United States

October Term, 1974

No. 74-1068

THE PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

LARRY GRAYSON,

Respondent.

On Petition For Writ Of Certiorari To
The Supreme Court Of Illinois

MEMORANDUM IN OPPOSITION

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IN THE

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THE PEOPLE OF THE STATE OF ILLINOIS,

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Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

MEMORANDUM IN OPPOSITION

Certiorari should be denied for the following reasons:

1. This case does not necessarily present a question arising under the constitution of the United States. The principle of collateral estoppel is as much a part of Illinois law as it is a part of the Fifth Amendment. In stating the principle of collateral estoppel, the Illinois Supreme Court quoted from *Ashe* v. *Swenson,* 397 U.S. 436, 443 but also cited the case of *People* v. *Haren,* 27 Ill.2d 229 (1963) (holding that the doctrine of collateral estoppel or "estoppel by verdict" applies in criminal cases).

2. When the court reached its ultimate conclusion—*i.e.* that difference between the burden of proof in probation revocation proceedings and criminal prosecutions ". . . cannot fairly serve to permit relitigation of the identical issue upon the same evidence"—the Court cited and relied upon *People* v. *Armstrong,* 56 Ill.2d 159 (1974) (holding that the principle of collateral estoppel applies to successive motions to suppress the same evidence, made before different judges by the same defendant.

3. Those cases were not decided on the basis of the Fifth Amendment, but were decided under Illinois law. In fact, *People* v. *Haran* was decided prior to the decision of this Court in *Benton* v. *Maryland,* 395 U.S. 784 (1969), holding that the Double Jeopardy Clause is applicable to the States. It is not true, therefore, as argued by petitioner, that ". . . the doctrine of collateral estoppel cannot be extended beyond the scope of the Fifth Amendment guarantee in the manner adopted by the Supreme Court of Illinois." (Petition, p. 9) The Illinois Supreme Court can extend the doctrine under State law beyond the scope of the Fifth Amendment guarantee. The States are free to develop higher standards of constitutional protections than those afforded under the Fourth, and presumably, the Fifth Amendments. (See *Cooper* v. *California,* 386 U.S. 52, 62 1967).)

4. Since the probation revocation proceedings in this case are entirely a creature of State law, the States should be free to determine under what circumstances prior proceedings will act as a bar to probation revocation. In this context it is helpful to observe that although in Illinois there is a difference in the standard of proof, the States are free to require proof beyond a reasonable doubt in

probation revocation proceedings. Any decision by this Court on this issue would accordingly be limited to States which have the same burden of proof in probation revocation proceedings.

5. Since there is an adequate and independent state ground for the Illinois Supreme Court's decision, this Court should avoid deciding the constitutional question raised by petitioner.

CONCLUSION

For the reasons urged herein, it is respectfully requested that the petition for certiorari to review the judgment of the Supreme Court of Illinois be denied.

Respectfully submitted,

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